Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-997

BURTON A. LIBRACH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

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No.....

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

Burton A. Librach, petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on November 28, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals to which this Petition is directed is not yet reported.(App. A.)

The opinion delivered by the District Court on rendition of the judgment is not reported. (App. D.) An opinion of the Court of Appeals remanding the case for further findings is reported 602 F. 2d. 165, (8th Cir., 1979). (App. C.) The District Court's response to the remand is reported. 476 F. Supp. 412.(App. B.)

The opinion on the first trial of the case is reported 520 F. 2d. 550, (8th Cir., 1975). (App. F.) The opinion on the second trial is reported at 536 F. 2d. 1228, (8th Cir. 1976.) (App. E.)

JURISDICTIONAL STATEMENT

Final judgment of the Court of Appeals (App. A.) was entered November 28, 1979. No motion for rehearing was filed.

This court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 USC Sec. 1254.

QUESTIONS PRESENTED

1. Whether a new trial is required when it is shown that the prosecutor knowingly failed to produce properly requested statements of an essential prosecution witness, exculpatory of the

accused and inconsistent with the witness's trial testimony and other pretrial statements.

2. Whether the trial court and the court of appeals misconstrued and misapplied this court's opinions in United States v. Agurs, 427 US 97 and Giglio v. United States, 405 US 150, in holding that a new trial was not required under the circumstances described in Question 1, simply because of the district court's finding that "the court is totally unable to conclude that (the omitted) evidence might have affected the trial's outcome."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, Constitution of the United States

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation. (Emphasis supplied.)

Rule 33, Federal Rules
of
Criminal Procedure

New Trial

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If the trial was by the court without a jury, the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of new judgment if entered, take additional testimony and direct the entry of new judgment. A motion for new trial based on the ground of newly discovered evidence may be made only before or within the two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for new trial on any other grounds shall be made within seven days after verdict or finding of guilty within such further time as the court may fix during the seven day period. (Emphasis supplied.)

STATEMENT OF THE CASE

The petitioner was found guilty of making a false statement and using a false document, in violation of 18 USC Sec. 1001. The conviction was reversed and the case remanded for new trial because of the failure of the prosecution to advise the defense that Robert Fowler, an alleged accomplice and essential prosecution

witness, had been receiving payments under a witness protection program. United States v. Librach, 520 F. 2d. 550 (8th Cir. 1975.) The court of appeals so ordered even though the opinion pointed to circumstances which might have induced the jury to find guilt in spite of impeaching evidence against witness Fowler.

Petitioner's counsel, prior to the second trial, made a specific request for production of statements of the prosecution witnesses. The government produced a statement from Fowler dated May 8, 1974, in which he admitted wrongdoing but did not implicate the petitioner, but the United States Attorney specifically stated that the government had no knowledge of any other statement to the F.B.I. and, therefore, could not produce any other statement. The jury again found the petitioner guilty, and the conviction was affirmed, United States v. Librach, 536 F. 2d 1228, (8th Cir., 1976), cert. den. 429 US 939 (1976.) (App. F.)

The petitioner then made use of the Freedom of Information Act, 5 USC Sec. 552 (1976), and obtained, among other things, an additional statement Fowler made to an agent of the Federal Bureau of Investigation, on August 16, 1973.[1]

- -

[1]The government also failed to produce another statement of Fowler, given

This statement was reported to an Assistant United States Attorney soon after it was made. Fowler, in this statement, denied any wrongdoing whatsoever in regard to the transactions which are the subject matter of the charges against the petitioner.

Petitioner then filed, on November 8, 1978, a timely motion for new trial on the ground of newly discovered evidence. The motion was supported by documents and affidavits. No counter-affidavits were filed by the government.

The district court denied the motion for new trial, without hearing, in an unreported memorandum. (App. D.) The district judge said that the asserted newly discovered evidence was impeaching and essentially cumulative, and did not require a new trial. The court of appeals remanded for further findings pursuant to United States v. Agurs, 427 US 97 (1976), in an order reported United States v. Librach, 602 F. 2d. 165, (8th Cir., 1976.)

- -

on June 20, 1974, and tending to show that threats against his person, evidence of which had been admitted in the trial, were not made in the interest of the Petitioner. Though this statement is less central to the issues than the August 13, 1973 statement, the failure to produce it is inexcusable and should be considered in evaluating the case.

(App. C.)

On remand, the district court found, as to the August 13, 1979 statement, as follows: 476 F. Supp. 412 (App. D.)

> The court is totally unable to conclude that this evidence might have affected the trial's outcome or might have created a reasonable doubt that might (not) otherwise exist. Fowler was subject to extensive cross-examination by counsel for defendant. That he had originally denied any involvement in criminal activity could not possibly have the impact upon the trial that the defendant infers. The fact that Fowler, upon admitting involvement, originally did not implicate defendant was known to defendant and was a basis for cross-examination.
>
> The court of appeals, in affirming, (App. A.), said:
>
> > . . . Clearly, the presiding judge at both trials is in the best position to evaluate whether the new evidence could have affected the judgment of the jury or the outcome of the trial . . .

REASONS FOR GRANTING THE WRIT

We submit that the opinion of the court of appeals is in conflict with the controlling decisions of United States v. Agurs,

427 US 927, 49 L. Ed. 2d. 342, 96 S. Ct. 2392 (1976) and Giglio v. United States, 405 US 150, 31 L. Ed. 2d. 104, 92 S. Ct. 763 (1972), in holding that a new trial was not required, in a case in which the government knowingly failed to produce properly requested statements of an essential prosecution witness, which were exculpatory of the petitioner, and inconsistent both with the witness's trial testimony and other pretrial statements which were produced.

Agurs sought to give definitive instruction on the subject of failure of the prosecution to produce evidence helpful to the defense in reviewing the holding of Giglio and also Brady v. Maryland, 373 US 93, 10 L. Ed. 2d. 215, 83 S. Ct. 1194 (1963). The opinion discussed three situations. The first one, involving knowing use of perjured testimony, is not involved at this state of the present case. The second situation discussed was that in which a proper request is made for material in the possession of the prosecution which is helpful to the defense. The third situation, actually applicable on the facts to Agurs, involved material in the possession of the prosecution but for which no request has been made by the defense. This Court held that the failure of the prosecution to produce unrequested materials did not require a new trial, unless, on review of the record, it appeared that the omitted evidence was significant to the case. This Court held that the trial judge could make such a finding, and reversed the contrary holding of the court of appeals.

The present case, however, involves material which was specifically requested, and the existence of which the government positively denied. Agurs discussed this situation also. The discussion probably is obiter dicta, but clearly designed to give definitive guidance for future cases. The opinion stated (l.c. 106)

> When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

The Court went on to hold that there must be a new trial "if the suppressed evidence might have affected the outcome of the trial." (l.c. 104).

Fowler's statement of August 13, 1973 is obviously relevant. Fowler was a key witness, whose testimony was essential to the government. (See opinion on first appeal, 520 F. 2d. 550, App. F.) In the August 13 statement, he denied any wrongdoing whatsoever, and exculpated the petitioner. The statement of May 8, 1974, which was introduced for impeachment at the second trial, admitted guilt and simply failed to mention the petitioner. It would be of unquestioned benefit to the defense to have a statement which is different from anything else in evidence, and showed that the witness would tell a different story every time he was questioned. It simply is not sound to hold that strongly impeaching evidence is immaterial, simply because the jury has believed a witness in the fave of other, and different impeaching evidence.

The trial judge, however, simply acted as another juror and said, in effect, that he would not have reached a different conclusion if he had been on the jury. Under the facts of this case, the requested and omitted material is clearly the kind of material that might have affected the result. The only solution is to give this material to a jury along with the other evidence, and see how the jury weighs the total.

Such holding would be in line with Giglio, the authority of which is reaffirmed by Agurs. Giglio is a prosecutorial misconduct case, whereas, Agurs is not. Giglio also establishes the proposition that the knowledge of any attorney in the prosecutor's office is the knowledge of the office.

Any contrary holding, in addition to infringing the right to trial by jury, is an open invitation to prosecutorial misconduct. There would be no impetus to act diligently on the defense's requests, if it is always open to argue to the trial judge, mindful of his docket, that omitted material would not have made any difference.

We admit that we are persistent, but the egregious prosecutorial misconduct shown by this record threatens the very integrity of the criminal justice system. We have moved as quickly as we could, after learning the facts.

CONCLUSION

For each and all of the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 79-1071

United States of America,	*	
	*	
Appellee,	*	Appeal from the United
	*	States District Court
v.	*	for the Eastern District
	*	of Missouri.
Burton A. Librach,	*	
	*	
Appellant.	*	

Submitted: September 20, 1979

Filed: November 28, 1979

Before LAY, HEANEY, and BRIGHT, Circuit Judges.

BRIGHT, Circuit Judge.

Appellant Burton A. Librach appeals the denial of his motion for a new trial on recently discovered new evidence which, he alleges, had been withheld deliberately by the Government at the time of trial. The district court (Hon. John F. Nangle) considered the new evidence under the standards set forth in United States v. Agurs, 427 U.S. 97 (1976), and

denied the new trial motion. We affirm.

I.

In a prior opinion remanding this case to the district court, we reviewed the history of the present litigation. United States v. Librach, 602 F.2d 165 (8th Cir. 1979). Briefly, Librach was convicted of filing a false claim and using a false document to obtain urban renewal relocation payment. This court reversed that conviction and ordered a new trial because the Government suppressed evidence that it had paid its key witness, Robert Fowler, and had placed him in protective custody. United States v. Librach, 520 F.2d 550 (8th Cir. 1975) (Librach I). At the new trial a second jury convicted Librach and we affirmed on appeal. United States v. Librach, 536 F.2d 1228 (8th Cir.), cert.denied, 429 U.S. 939 (1976) (Librach II).

Having successfully obtained new information from the Government under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976),[1] once again Librach sought a new trial. The district court denied Librach's new trial motion. On appeal, we vacated the district court's order and remanded for reconsideration in light of standards articulated in United States v. Agurs, 427 U.S. 97 (1976), retaining jurisdiction over the appeal. United States v. Librach, 602 F.2d 165 (8th Cir. 1979) (Librach III). In remanding for reconsideration, we said:

> The district judge, who presided over both of Librach's trials, is in the best position to determine whether any of the newly discovered evidence requires a new trial under the Agurs standards. Therefore, we vacate the district court order as based on an erroneous legal standard and remand for further proceedings consistent with this opinion. [Id. at 167.]

[1] This court filed an opinion in one phase of Librach's FOIA lawsuit. Librach v. Federal Bureau of Investigation, 587 F.2d 372 (8th Cir. 1978), cert. denied, 99 S.Ct. 1222 (1979).

The district court has reconsidered the appellant's motion in light of the Agurs tests, and in an unpublished opinion has denied relief to the appellant. The record as supplemented by proceedings on remand has been certified to us. The parties have submitted additional briefs relating to the district court's final order denying Librach a new trial. We now consider the merits of the appeal.

II.

Librach's new trial motion focuses principally on previously undisclosed information affecting the credibility of two government witnesses: Robert Fowler, a crucial witness against appellant, and Timothy David Person, a witness of somewhat less importance. As to Fowler, appellant claims that the Government did not turn over information that on August 16, 1973, Fowler had made a statement to the FBI in which, contrary to his later testimony at trial, he denied soliciting or receiving kickbacks in connection with his employment at the St. Louis Land Clearance Redevelopment Authority. In addition, appellant maintains that new evidence, in the form of a June 20, 1974, statement by Fowler to the FBI and two teletype requests for witness protection for Fowler sent by the United States Attorney, establishes that someone other than Librach had threatened Fowler. Finally, appellant alleges that the Government allowed Fowler to testify falsely: (1) that the Government did not prosecute him because of his ill health when he actually had received immunity for cooperation; and (2) that he (Fowler) had participated in more than two but less than ten

fraudulent renewal relocation transactions when he actually had engaged in over fifty.

With respect to witness Person, appellant charges that new evidence discloses that Person testified under an informal promise of immunity and that the Government concealed this arrangement.

The district court considered and rejected each of Librach's contentions relating to witness Fowler under the tests set forth in Agurs. With regard to Fowler's initial denial of complicity to the FBI, the district court determined:

> The Court is totally unable to conclude that this evidence might have affected the trial's outcome or might have created a reasonable doubt that might [not] otherwise exist. Fowler was subjected to extensive cross-exmaination by counsel for defendant. That he had originally denied any involvement in criminal activity could not possibly have the impact upon the trial that defendant infers. The fact that Fowler, upon admitting involvement, originally did not implicate the defendant was known to defendant and was a basis of cross-examination.

The district court also found no support for the new trial motion based on Fowler's testimony about receiving threats. Noting that the defendant, not the Government, had focused on the nature of the threats, the trial court concluded that Fowler's statements to the FBI did not exculpate Librach, and that the proceedings at trial "preclude the conclusion that the evidence might have affected the outcome of the trial or created a reasonable doubt that did not otherwise exist." Furthermore, the court found the teletypes from the United States

Attorney to be irrelevant on the issue of who threatened Fowler.

The trial court also rejected appellant's claim for a new trial based upon his allegations that the Government concealed Fowler's false testimony at the trial. In particular, the court questioned whether Fowler could be said to have testified falsely that he had not received immunity from prosecution.

> The record fails to reveal that immunity was ever granted, although approval to grant the same had been given. Fowler emphatically denied that he had, in fact, been given immunity and the area was the subject of much cross-examination. The record simply fails to support defendant's contention and the Court concludes, upon a review of the record herein, that these documents do not support any reasonable likelihood that the testimony, assuming arguendo that the same is false, could have affected the jury's judgment.[2]

---

[2]Although the district court did not specifically comment on the allegation that the Government permitted Fowler to testify falsely that he had engaged in more than two but less than ten fraudulent relocation transactions when in truth Fowler had engaged in fifty such false transactions, the trial court's opinion appears to encompass all testimony alleged to be false. Further, we observe that appellant's proof fails to show any admissions by Fowler himself of complicity in fifty fraudulent relocation matters.

Finally, as to the information concerning Person, the district court determined:

> The documents involving requests for and approval of a grant of immunity of Person are irrelevant herein where there is no evidence that Person was ever granted immunity or knew that a request for the same had been sought. It is this Court's conclusion that a witness' lack of knowledge that he could be granted immunity should he refuse to testify could not possibly affect the outcome of the trial, or create a reasonable doubt that did not otherwise exist.

In summary, after considering all the information advanced by Librach as a basis for new trial under United States v. Agurs, supra, the district court concluded:

> This Court has presided over two trials herein. Following his second conviction, defendant did not even challenge the sufficiency of the evidence presented. The documents submitted by defendant in support of his motion for a new trial do not give rise to even the slightest doubt in this Court's mind that the same would have affected the judgment of the jury, the outcome of the trial or create a reasonable doubt that did not otherwise exist.

The trial court's firsthand appraisal of the record was "thorough and entirely reasonable."

United States v. Agurs, supra, 427 U.S. at 114. Clearly, the presiding judge at both trials is in the best position to evaluate whether the new evidence could have affected the judgment of the jury or the outcome of the trial. In the main, the newly discovered evidence represents impeachment material affecting the credibility of prosecution witnesses, not evidence pertaining to the quality and nature of Librach's conduct bearing on guilt or innocence. Furthermore, we must take into account that, save for some difference in the quality of impeachment evidence, two different juries have determined Librach's guilt on substantially similar evidence.

The trial judge has carefully reviewed the contentions made by Librach in conformity with our remand instructions. In light of the whole record, we conclude that the trial court did not err in holding that the evidence allegedly suppressed by the prosecution does not justify a third trial.

Accordingly,we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 74-199CR (2)
vs.	)	
BURTON A. LIBRACH,	)	
Defendant.	)	

ORDER

Pursuant to the memorandum filed this date,

IT IS HEREBY ORDERED that the December 20, 1978 order of this Court be and is reaffirmed and that defendant's motion for new trial be and is denied.

IT IS FURTHER ORDERED that this cause shall be certified by the Clerk of this Court to the United States Court of Appeals for the Eighth Circuit in accordance with that court's order of July 17, 1979.

/s/ John F. Nangle
UNITED STATES DISTRICT
JUDGE

Dated: September 19, 1979.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No.: 74-199 CR (2)
vs.	)	
BURTON A. LIBRACH,	)	
Defendant.	)	

MEMORANDUM

This matter is before the Court upon a limited remand by the United States Court of Appeals for the Eighth Circuit in order that this Court may review evidence, alleged to be newly discovered evidence by defendant after his second trial, pursuant to the standards set forth in United States v. Agurs, 427 U.S. 97 (1976).

Defendant Librach was charged and convicted of a violation of 18 U.S.C. §1001, said charge arising out of payments received by defendant from the Department of Housing and Urban Development. Defendant's conviction was reversed and the cause remanded for a new trial because the government failed to advise defendant that a key witness, Robert Fowler, had been paid approximately $10,000.00 and had been placed in protective custody. United States v. Librach, 520 F.2d 550 (8th Cir. 1975). Retrial resulted in conviction; said conviction was affirmed on appeal. United States v. Librach, 536 F.2d 1228 (8th Cir. 1976), cert. denied, 429

U.S. 939 (1976). Defendant thereupon received certain evidence, following an action brought under the Freedom of Information Act, 5 U.S.C. §552, and filed a motion for new trial based thereon. The evidence so received is:

1. An interview report prepared by an agent of the Federal Bureau of Investigation concerning an interview with Robert Fowler. This report contains a summary of Fowler's employment with the St.Louis Land Clearance for Redevelopment Authority and the responsibilities of the various positions that he held. Further, Fowler was shown copies of three bids for a certain move and advised the agent that he could not recall the same. Fowler stated that he never solicited a kick-back payment and denied receiving any kick-back. He denied receiving a specific payment from a certain individual. Fowler, however, later testified to the contrary. As noted by the Court of Appeals herein,

> Fowler did not implicate the defendant when he was first interviewed under oath in May, 1974, but later he testified that he arranged the fraudulent payment with Librach's knowledge and connivance, receiving in return a kickback of $1,000.00. United States v. Librach, 520 F.2d 550, 552 (1975).

2. Three documents revealing that the United States Attorney requested immunity for Timothy David Person, and that said request was approved. There is absolutely no evidence, however, that the immunity request or approval was ever communicated to Person, or that Person in fact was granted immunity.

3. An interview report prepared by an agent of the Federal Bureau of Investigation concerning an interview with Robert Fowler in which Fowler recited various threats that he had received. One threat involved an unknown black male who approached Fowler, then hospitalized, and who made references to a Richard Green in connection with the threat against Fowler. A second threat involved a telephone call received by Fowler, from an unknown male who Fowler thought to be a black male. The third threat again involved a telephone call from an unknown male, this caller believed by Fowler to be a white male. Defendant contends that this statement establishes that it was Richard Green, and not defendant, who had threatened Fowler's life. The Court notes preliminarily that the interview report does not support such an inference, since the individuals who made the threats by telephone are not identified and apparently made no references to Richard Green. Furthermore, the Court notes that it was defendant who repeatedly interjected the issue of threats against Fowler's life into the trial herein. In closing arguments, the Assistant United States Attorney stated:

> Now, Burton Librach is not on trial today for threatening somebody's life. He's not on trial for threatening Mr. Fowler's life. I don't know who threatened his life. I don't know if Green threatened his life or the defendant threatened his life or somebody on behalf of the defendant, or who. That's not what is on trial here today, and that's not the issue and I didn't bring it up, Mr. Kohn did, about who is threatening who.

4. Copies of teletypes requesting that Robert

Fowler be placed in the United States Marshal's witness protection program. Defendant was well aware that Fowler had received support payments from the government during the time of his protective custody. See United States v. Librach, 536 F.2d 1228, 1230 (8th Cir. 1976). This area was the subject of extensive cross-examination at trial.

5. A statement made by Timothy David Person, and an interview report prepared by an agent of the Federal Bureau of Investigation concerning a statement made by Person. These documents state that Person submitted a bid for the move of the Windmere Hotel and was advised by Fowler that the bid was accepted. On the day preceding the move, Person contacted defendant concerning the time for the move and was advised by defendant that other arrangements had been made. Accordingly, Person did not make the move and was not paid for making the move. Upon being shown an invoice for the move of the hotel, signed by Person as paid in full, Person stated that the signature was his but that he did not know where it came from. Person further advised the Federal Bureau of Investigation of the general nature of his involvements with the St. Louis Land Clearance for Redevelopment Authority and the fact that he had made personal loans to Robert Fowler on various occasions. Person also stated that he understood that the defendant held the mortgage on Fowler's home and that Fowler had not been steadily employed in a number of years. At trial, Person testified that he had prepared a bid on the move at Fowler's request. He further testified that he had obtained for submission the bids of other movers for the same move, all bids by pre-arrangement higher than the bid submitted by Person. He further testified that he had never seen the invoice marked "Paid in Full" although his signature was on the same. He further testified

concerning prior meetings and arrangements with Fowler.

Defendant contends that he had no knowledge of the agreement between the government and Person concerning possible charges against Person. Defendant was aware, however, that a four-count indictment against Person had been dismissed and that Person had instead entered a plea of guilty to a misdemeanor. Counsel for defendant did not pursue this area in cross-examination in any attempt to impeach Person's credibility. Moreover, Person's testimony was essentially cumulative. Compare Giglio v. United States, 405 U.S. 150 (1972). In view of the nature of the evidence against defendant, defendant's knowledge of the dismissal of the indictment against Person and minimal impact of Person's testimony against defendant, the Court must conclude that the outcome of the trial would not have been affected, nor a reasonable doubt created that did not otherwise exist.

As noted by the Court of Appeals in the partial remand herein, United States v. Burton A. Librach, No. 79-1071 (8th Cir. July 17, 1979), slip opinion at pages 3-4,

> 1) Where "the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury [,]" the conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Agurs, supra, 427 U.S. at 103.

2) Where defense counsel makes a pretrial request for specific evidence, e.g., the extrajudicial statements made by an accomplice, the conviction cannot stand if "the suppressed evidence might have affected the outcome of the trial." Id. at 104.

3) Where defense counsel makes a general request for all exculpatory material, or makes no request at all, reversible error has been committed "if the omitted evidence creates a reasonable doubt that did not otherwise exist." Id. at 112.

It is the Court's conclusion that defendant's motion for new trial must be denied.

The interview reports concerning statements made by Fowler, in which he denied soliciting or receiving kick-backs, arguably constitutes exculpatory evidence, as well as the statements of an accomplice. The Court is totally unable to conclude that this evidence might have affected the trial's outcome or might have created a reasonable doubt that might otherwise exist. Fowler was subjected to extensive cross-examination by counsel for defendant. That he had originally denied any involvement in criminal activity could not possibly have the impact upon the trial that defendant infers. The fact that Fowler, upon admitting involvement, originally did not implicate defendant was known to defendant and was a basis of cross-examination.

The documents involving requests for and approval of a grant of immunity of Person are irrelevant herein where there is no evidence that Person

was ever granted immunity or knew that a request for same had even been sought. It is this Court's conclusion that a witness' lack of knowledge that he could be granted immunity should he refuse to testify could not possibly affect the outcome of the trial, or create a reasonable doubt that did not otherwise exist.

The report relating to threats against Fowler offers no support to defendant herein. It was defendant, and not the government, who chose to focus on the threats and the nature thereof. Contrary to defendant's assertion, the document does not prove that defendant was not involved in the threats; the report is certainly not exculpatory. Moreover, the arguments of counsel, as well as the testimony at trial, preclude the conclusion that the evidence might have affected the outcome of the trial or created a reasonable doubt that did not otherwise exist.

The Court totally fails to perceive the relevance of the two teletypes sent regarding Fowler's placement in the United States Marshal's witness protection program. The Court understands that counsel for the parties herein have been engaged in a long-standing battle concerning the question of whether one or two teletypes were actually sent by the United States Attorney's office. Even assuming arguendo that defendant is correct in asserting that two teletypes were sent, the same is totally irrelevant to the jury's determination herein. Said evidence would not even be brought to the jury's attention. Thus, the Court must conclude that said documents do not fall within the categories of Agur, supra. Cf., Delay v. United States, No. 79-1070 (8th Cir. July 18, 1979).

The documents relating to Person's statement and interview similarly fail to pursuade this Court that a new trial is required. Said statements do not reveal any information from which this Court could conclude that there is a reasonable likelihood that the judgment of the jury could have been affected, that the outcome of the trial might have been affected or that a reasonable doubt could have been created that did not otherwise exist.

Defendant contends that the government permitted Fowler to give false testimony in that Fowler testified that he had not been given immunity but told that he would not be prosecuted because of his ill health. Fowler further testifed that he had been told that he would not be prosecuted "in return for . . . [his] testimony in this trial" "and for telling the truth". Defendant cites in support an internal document of the Federal Bureau of Investigation in which it states that it was anticipated that prosecution of Fowler would be declined because of Fowler's cooperation. Defendant also cites a request for, and approval of, immunity authorization for Fowler. The testimony at trial reveals that the Assistant United States Attorney elicited from Fowler that the decision not to prosecute was based, at least in part, upon Fowler's cooperation in testifying at trial. The record fails to reveal that immunity was ever granted, although approval to grant the same had been given. Fowler emphatically denied that he had, in fact, been given immunity and the area was the subject of much cross-examination. The record simply fails to support defendant's contention and the Court concludes, upon a review of the record herein, that these documents do not support any reasonable likelihood that the testimony, assuming arguendo that the same is false, could have affected the jury's judgment. The Court further concludes that said evidence, had it been known at the time of trial, would not have created a reasonable doubt that did not otherwise exist,

nor would the same have affected the outcome of the trial.

Defendant also contends that the government permitted Fowler to give false testimony. Specifically, defendant states that Fowler testified that he had been told that he would not be prosecuted because of his ill health. Defendant argues that the true reason that Fowler was not prosecuted was his cooperation with the federal authorities. Defendant refers to a document of the Federal Bureau of Investigation in which it states:

> For the information of the Bureau, AUSA BARRY SHORT advised in view of cooperation with the Government by PERSON and FOWLER, he does not anticipate prosecution of those 2 subjects, however, he has not yet formally declined prosecution of these subjects and they are still carried in the title.

Defendant further refers to a request for immunity authorization, later approved, concerning Fowler. The record does not reflect that Fowler was ever granted immunity pursuant to said authorization.

Defendant also contends that the government concealed a deal made with Timothy Person. As early as October, 1975, defendant knew that Person had been charged in a four-count indictment with violations of 18 U.S.C §1001. Defendant further knew that the indictment had been dismissed and that Person entered a plea of guilty to an information charging Person with a misdemeanor in violation of 18 U.S.C. §1012. Defendant has filed the affidavit of Person's attorney which states in part:

> In connection with the disposition of Mr. Person's case, the

> United States Attorney's Office stated to me that my client would not be subject to any further prosecution for his involvement in transactions with the St. Louis Land Clearance for Redevelopment Authority in exchange for his cooperation and information in the investigation and prosecution by the government of fraudulent claims in the St. Louis Land Clearance for Redevelopment Authority.

At trial, the government asked Person if he had ever been convicted of a misdemeanor or felony. Person testified that "[i]t was a misdemeanor in relationship to this Land Clearance, the handling of the documents." Counsel for defendants did not inquire further.

This Court has presided over two trials herein. Following his second conviction, defendant did not even challenge the sufficiency of the evidence presented. The documents submitted by defendant in support of his motion for new trial do not give rise to even the slightest doubt in this Court's mind that the same would have affected the judgment of the jury, the outcome of the trial, or create a reasonable doubt that did not otherwise exist. As noted by the Supreme Court in Giglio v. United States, supra, at 154,

> We do not . . . automatically require a new trial whenever "a combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . ." United States v. Keogh, 391 F.2d 138, 148 (CA2 1968).

Accordingly, this Court reaffirms its prior ruling, denying defendant's motion for new trial. In accordance with the mandate of the Court of Appeals, this ruling shall be certified to the appellate court.

/s/ John F. Nangle
UNITED STATES DISTRICT JUDGE

Dated: September 19, 1979.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1071

United States of America,	*	
	*	
Appellee,	*	Appeal from the
	*	United States District
v.	*	Court for the
	*	Eastern District of
Burton A. Librach,	*	Missouri.
	*	
Appellant.	*	

Submitted: April 18, 1979

Filed: July 17, 1979

Before LAY, HEANEY, and BRIGHT, Circuit Judges.

O R D E R

Burton A. Librach appeals from an order denying his motion for a new trial based on newly discovered evidence. He contends that the Government suppressed

evidence that was favorable to his defense against criminal charges brought under 18 U.S.C §1001 (1976).[1] We vacate the district court order and remand for further proceedings.

In 1974, Librach was tried and convicted of filing a false claim and using a false document to obtain an urban renewal relocation payment of $9,700 from the Department of Housing and Urban Development. The following year this court reversed the conviction because the Government had suppressed evidence that it had paid its key witness, Robert

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[1] 18 U.S.C §1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Fowler, approximately $10,000 and that it had placed Fowler in protective custody. United States v. Librach, 520 F.2d 550 (8th Cir. 1975). Upon retrial in 1976, a jury again found Librach guilty of the crimes charged. We affirmed that conviction on appeal. 536 F.2d 1228 (8th Cir.), cert. denied, 429 U.S. 939 (1976).

On November 6, 1978, Librach filed the instant motion for a new trial based on new evidence that he had uncovered by means of an action brought under the Freedom of Information Act (FOIA).[2] This "newly discovered" evidence was known to the prosecution at the time of Librach's second trial, but allegedly unknown to the defense. Librach contends that this new evidence, which included statements made by Fowler to the FBI, was favorable and material to his defense, and thus that the Government's suppression of that evidence called for a new trial. The district court, relying on United States v. Frye, 548 F.2d 765 (8th Cir. 1977), denied the motion for the following reasons:

> As noted by the government in response to the instant motion, the evidence is in general of an impeaching nature. A substantial amount is cumulative. Viewing the evidence separately and cumulatively, it is not of such a nature "as that, on a new trial, the newly discovered evidence would probably produce an acquittal". Frye, supra.

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[2]This court filed an opinion in one phase of Librach's FOIA lawsuit. Librach v. Federal Bureau of Investigation, 587 F.2d 372 (8th Cir. 1978), cert. denied, 99 S.Ct. 1222 (1979).

On appeal, Librach urges, and the Government concedes, that the Frye test does not apply to this case. As the Supreme Court stated in United States v. Agurs, 427 U.S. 97 (1976):

> [T]he fact that [newly discovered] evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. [Agurs, supra at 111 (footnote omitted).]

The Court in Agurs set forth three separate tests, each of which applies in a different situation involving the post-trial discovery of information that had been known to the prosecution but unknown to the defense:

1) Where "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury [,]" the conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Agurs, supra, 427 U.S. at 103.

2) Where defense counsel makes a pretrial request for specific evidence, e.g., the extrajudicial statements made by an accomplice, the conviction cannot stand if "the suppressed evidence might have affected the outcome of the trial." Id. at 104.

3) Where defense counsel makes a general request for all exculpatory material, or makes no request at all, reversible error has been committed "if the omitted evidence creates a reasonable doubt that did not otherwise exist." Id. at 112.

In the present case, various portions of the newly discovered evidence arguably fall within each of the three Agurs categories. The district judge, who presided over both of Librach's trials, is in the best position to determine whether any of the newly discovered evidence requires a new trial under the Agurs standards. Therefore, we vacate the district court order based on an erroneous legal standard and remand for further proceedings consistent with this opinion.

The district court may, in its discretion, conduct a further evidentiary hearing. Upon making supplementary findings of fact and appropriate conclusions of law, the district court shall certify its ruling on Librach's new trial motion to this court. We request that the district court proceed as promptly as possible. Subject to this limited remand, we retain jurisdiction.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 74-199 CR (3)
vs.	)	
BURTON A. LIBRACH,	)	
Defendant.	)	

ORDER

Pursuant to the memorandum filed this date,

IT IS HEREBY ORDERED that defendant's motions for a new trial, and for discovery and inspection and production be and are denied.

/s/ John F. Nangle

UNITED STATES DISTRICT JUDGE

Dated: December 20, 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 74-199 CR (3)
	)	
vs.	)	
	)	
BURTON A. LIBRACH,	)	
	)	
Defendant.	)	

MEMORANDUM

This matter is before the Court upon defendant's motion for a new trial, and in connection therewith, for discovery and inspection, and for production. Defendant was originally tried and convicted in 1975. Said conviction was reversed. United States v. Librach, 520 F.2d 550 (8th Cir. 1975). Upon retrial, defendant was again convicted; this conviction was affirmed. United States v. Librach, 536 F.2d 1228 (8th Cir. 1976), cert. denied, 429 U.S. 939 (1976). Since conviction, defendant has received, by means of a suit pursuant to the Freedom of Information Act, 5 U.S.C. §552, certain evidence which he contends warrants a new trial herein. The court disagrees.

In United States v. Frye, 548 F.2d 765 (8th Cir. 1977), the court stated:

> Before a new trial on the ground of newly discovered evidence can be granted, each of the five conditions must be met:

> (a) The evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal. Id. at 769.

The Court must also bear in mind that

> We do not . . . automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . ." United States v. Keogh, 391 F.2d 138, 149 (CA2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87 [Brady v. Maryland, 373 U. S. 83 (1963)]. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . ." Napue, supra, at 271 [Napue v. Illinois, 360 U.S. 264 (1959)]. Giglio v. United States, 405 U.S. 150, 154 (1972).

The Court has carefully reviewed the evidence on

which defendant relies, and the arguments advanced by defendant. As noted by the government in response to the instant motion, the evidence is in general of an impeaching nature. A substantial amount is cumulative. Viewing the evidence separately and cumulatively, it is not of such a nature "as that, on a new trial, the newly discovered evidence would probably produce an acquittal". Frye, supra.

Accordingly, defendant's motions will be denied.

/s/ John F. Nangle

UNITED STATES DISTRICT JUDGE

Dated: December 20, 1978.

APPENDIX E

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 76-1060

United States of America, Appellee, vs. Burton A. Librach, Appellant.	* * * * * * * * * *	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: May 10, 1976

Filed: June 17, 1976

Before VOGEL, Senior Circuit Judge, and HEANEY and HENLEY, Circuit Judges.

HEANEY, Circuit Judge.

Burton A. Librach was charged in a two-count indictment with filing a false claim and using a false document to obtain an urban renewal relocation payment of $9,700 from the Department of Housing and Urban Development in violation of 18 U.S.C §1001.

After trial to a jury, he was found guilty. The judgment of conviction was, however, reversed by this Court because the government suppressed, contrary to the dictates of Brady v. Maryland, 373 U.S. 83 (1963) evidence that was both favorable and material to the defense. United States v. Librach, 520 F.2d 550 (8th Cir. 1975). Upon retrial, Librach was again found guilty by a jury of the crimes charged. We affirm the judgment of conviction.

I.

The principal witness for the government was an accomplice, Robert Fowler.[1] It is argued by the appellant that Fowler's testimony should have been suppressed because it was induced by an improper grant of immunity and by illegal payments of money.

A.

Fowler testified after receiving from the government a promise that he would not be prosecuted for those offenses known to have been committed by him in the Eastern District of Missouri. The agreement had been characterized during the first trial as an informal grant of immunity because the government admittedly did not seek court approval pursuant to the statutory immunity

[1] A more complete recital of the facts can be found in United States v. Librach, 520 F.2d 440 (8th Cir. 1975).

provisions of 18 U.S.C §6001 et seq.[2]

This failure to seek court approval does not render the agreement unlawful. The decision of whether to prosecute rests in the Executive Branch. See United States v. Nixon, 418 U.S. 683,693 (1974); United States v. Cowan, 524 F.2d 504, 507-508 (5th Cir. 1975); Weisberg v. U.S. Department of Justice, 489 F.2d 1195, 1201 (D.C. Cir. 1973) (en banc), cert. denied, 416 U.S. 993 (1974); United States . Alarik, 439 F.2d 1349, 1350-1351 (8th Cir. 1971). It can be reviewed only in those limited situations in which there has been a clear abuse of discretion. Oyler v. Boles, 368 U.S. 448, 456 (1962); United States v. Alarik, supra at 1350-1351. See K. Davis, Discretionary Justice 207-214 (1969). The decision to grant Fowler, rather than the appellant, informal immunity has not been shown to be arbitrary.[3] The

[2] The government did request and obtain authority from the Justice Department to apply to the court for an order of immunity for Fowler. The authority was, however, never exercised because Fowler testified voluntarily. Counsel for the government stated at oral argument that the authority was obtained from the Justice Department as a precautionary measure in light of the fact that an accomplice could, when put on the stand, renege on his agreement to testify. See United States v. Edwards, 516 F.2d 913, 914 (8th Cir. 1975) (per curiam).

[3] This Court has previously questioned the wisdom of the decision. United States v. Librach, supra at 553. An unwise decision is not, however, necessarily an arbitrary one.

decision was made, so far as the record reveals, in good faith and upon consideration of appropriate factors. An agreement not to prosecute an accomplice who is cooperating in the conviction of others is recognized as a proper exercise of authority. A.B.A Standards for Criminal Justice, the Prosecution Function §3.9 (b)(vii) (Approved Draft, 1971).

Nor is the agreement so suspect that Fowler's testimony must be regarded as per se unreliable and excluded from evidence pursuant to the court's supervisory power to require fair conduct from the government in furnishing evidence. The agreement was made and binding upon the government before Fowler testified; it was not contingent upon the government's satisfaction with the content of the testimony. Fowler could testify truthfully and fully pursuant to the agreement without fear of reprisal. His testimony related to known facts; the agreement did not require the witness to seek out incriminating evidence against the appellant. Compare Alcorta v. Texas, 355 U.S. 28 (1957) (per curiam); Williamson v. United States, 311 F.2d 441 (5th Cir. 1962). Further, the jury was fully apprised of the conditions under which Fowler testified.

B.

Librach also argues that Fowler's testimony should have been suppressed because the latter, along with his wife and seven children, received $9,947.65 in support payments from the government contrary to law. The payments were received during the period that Fowler was in protective custody because of threats to his life.

The appellant's argument is premised upon the proposition that these protective custody payments could only have been authorized pursuant to Title V

of the Organized Crime Control Act of 1970, P.L. 91-452, 18 U.S.C. §3481, which is inapplicable because Librach was not involved in organized crime. The government contends that the payments were properly made pursuant to an alternative source of statutory authority, 28 U.S.C. §524.

The appellant has cited no authority for his proposition, either by reference to the decisional law or the legislative history of 28 U.S.C.§524.

The statute specifically states:

> Appropriations for the Department of Justice are available for payment of --
>
> (1) * * * expenses of witnesses and informants, all at the rate authorized or approved by the Attorney General or the Assistant Attorney General for Administration [.]

In our view, this language is broad enough to encompass the payments at issue.[4] Considerable weight is also given to the fact that the Department of Justice has consistently so interpreted the statute. See County of Marin v. United States, 356 U.S. 412, 420 (1958). We further note that the correctness of the government's interpretation of its statutory powers was conceded in United States v. Partin, 493 F.2d 750, 757-758 (5th Cir. 1974).

Moreover, not only were the payments properly

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[4]The more usual witness expenses are provided for in 28 U.S.C. § 1821.

authorized, but they were actually used for the purposes of protective custody. There is no basis upon which an inference can be made that the testimony of Fowler was purchased. Indeed, while protection from the threats was contemplated before Fowler testified before the grand jury, mention of money payments was not made until after that testimony was given. The evidence of the protective custody and support payments was put before the jury. The appellant had full opportunity to develop the implications thereof, and the jury was allowed to judge the credibility of Fowler in the light of all the circumstances.

Librach also contends that Fowler's testimony should have been suppressed because: (1) the support payments were authorized without full compliance with Department of Justice regulations, and (2) the threats against Fowler's life, which justified the protective custody, were fictitious. These claims were not raised before the District Court and, accordingly, will not be considered for the first time on appeal.[5] United States v. Bear Runner, 502 F.2d 908, 910 (8th Cir. 1974).

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[5]Librach's allegation that the threats to Fowler's life were fictitious is also the basis for his claim that the government knowingly used false evidence at trial. Specifically, he refers to Fowler's statements that he received the support payments because of the threats. This testimony was received during the redirect examination by the government to rehabilitate the witness's credibility. Again, we do not consider this contention on appeal because it was not raised below. The appellant did not object to the testimony at trial and did not make the contention a basis for his post-trial motion for an acquittal or new trial.

II.

Librach also argues that the government made prejudicial comments to the jury in its closing argument by implying, without factual support in the record, that he was a source of the threats to Fowler's life. Specifically, he objects for the first time on appeal to the following statement:

> Now, Burton Librach is not on trial today for threatening somebody's life. He's not on trial for threatening Mr. Fowler's life. I don't know who threatened his life. I don't know if Green threatened his life or the defendant threatened his life or somebody on behalf of defendant, or who. That's not what is on trial here today, and that's not the issue and I didn't bring it up, Mr. Kohn [the appellant's counsel] did, about who is threatening who.

Because objection to the statement was not made below, we review the alleged error under the plain error rule of Federal Rule of Criminal Procedure 52(b). The appellant must demonstrate that the closing argument "affected substantial rights resulting in a miscarriage of justice." United States v. Big Crow, 523 F.2d 995, 960-961 (8th Cir. 1975).

Appellant's counsel chose to focus upon the evidence of threats to Fowler's life in closing argument in an effort to draw adverse inference upon the witness's credibility and to imply that the threats came from another, not Librach. The

statement of which the appellant complains was made in rebuttal to this defense argument. When read in context, the government's argument was not improper. It was not made to imply that Librach threatened Fowler's life. The thrust of the statement was that the source of those threats was unknown and irrelevant. The government has the right to comment on arguments raised by the defense.[6] United States v. Olsen, 487 F.2d 77, 83 (8th Cir. 1973) cert. denied, 415 U.S. 993 (1974). Surely, if there was error, the error was not plain error.

III.

Librach further argues that he was denied due process because of an unreasonable delay between the time of the offense and the filing of the indictment that prejudicially affected his defense. See United States v. Jackson, 504 F.2d 337 (9th Cir. 1974), cert. denied, 420 U.S. 964 (1975). This claim was decided gainst the appellant in our previous decision. United States v. Librach, supra at 555. That decision is the law of the case. Hawkes v. Internal Revenue Service,507 F.2d 481, 482 n.1 (6th Cir. 1974); Thorton v. Carter, 109 F.2d 316, 320 (8th Cir. 1940).

IV.

Finally, Librach contends that the District Court

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[6] We noted in our previous opinion that the matter of protective custody because of the threats to Fowler's life could have connotations adverse to the appellant. United States v. Librach, supra at 554 n.4. Librach should not complain that the issue was argued, for it was his tactical decision to interject the matter into trial.

committed reversible error by refusing to permit a second reading to the jury of prior inconsistent statements of government witnesses which were given at the first trial. The statements were first read to the jury during the cross-examination of witnesses Fowler and Sam Siegal. The appellant contends that this ruling undermined the substantive force of these prior inconsistent statements contrary to Federal Rule of Evidence 801(d)(1)(A).

The District Court ruled, with the agreement of the government, that the prior statements read before the jury during cross-examination were substantative evidence and could be used for substantive purposes in closing argument. Its failure to permit the appellant to give the prior statements special emphasis by a second reading was not prejudicial error. See United States v. Skillman, 442 F.2d 542, 551 (8th Cir.), cert. denied 404 U.S. 833 (1971); Wright v. United States, 389 F.2d 996, 1000 (8th Cir. 1968).

We cannot conclude,as does the appellant, that the jury failed to understand the substantive effect of the prior statements. Indeed, one rationale of Federal Rule of Evidence 801 (d)(1)(A) is that juries do consider such evidence for substantive purposes even when instructed to the contrary. 4 Weinstein's Evidence Paragraph 801 (d)(1)(A)[01] (1975). Moreover, the appellant could have sought an instruction from the court at the time the evidence was first received to dispel any doubts that might have been in the jury's mind.

The judgment of conviction is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX F

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 75-1153

United States of America, Appellee, v. Burton A. Librach, Appellant.	*	Appeal from the United States District Court for the Eastern District of Missouri

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Submitted: June 12, 1975

Filed: July 30, 1975

Before GIBSON, Chief Judge, WEBSTER, Circuit Judge, and DEVITT, Chief District Judge.*

GIBSON, Chief Judge.

The defendant, Burton A. Librach, was convicted by a jury of filing a false claim and using a false

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*The Honorable Edward J. Devitt, Chief Judge, United States District court for the District of Minnesota, sitting by designation.

document to obtain an urban renewal relocation payment of $9,700 from the Department of Housing and Urban Development (HUD), in violation of 18 U.S.C. §1001 (1970). He was sentenced to six months confinement on count I and 2 years probation to be served consecutively on count II.

On appeal, defendant asserts as error (1) the court's refusal to grant a new trial based on prosecutorial suppression of favorable evidence, (2) the court's failure to dismiss the case because of prosecutorial delay in bringing the indictment, (3) admission of allegedly illegal testimony, (4) a procedural ruling allowing the Government to lead its own witness and attempt to refresh the recollection of the witness, and (5) imposition of sentence under the general felony fraud statute, §1001, rather than the more specific HUD misdemeanor statute, 18 U.S.C. §1012 (1970). We believe the defendant was denied a fair trial by the Government's suppression of evidence material to impeach its key witness, Robert Fowler, and thus reverse and remand for a new trial. Since defendant is subject to a retrial, we also pass upon the other assertions of error.

Defendant Librach, an attorney, was accused of filing a false claim in August, 1969, for expenses fictitiously incurred in relocating the furniture of the Windemere Hotel from the West End Urban Renewal Area of St. Louis, Missouri, to two buildings known as the Kingsbury Court Apartments owned by Librach's stepmother, Peppi Librach, who was too ill to participate in the trial. The defendant filed the claim as her attorney.

Librach obtained the funds from the St. Louis Land Clearance Redevelopment Authority (LCRA), a quasi-municipal agency under contract with HUD. Mrs. Librach was entitled under the LCRA program to a small business displacement award of $2,500 and reimbursement for her expenses in relocating the

hotel. The defendant is charged with fraudulently obtaining $9,700 reimbursement for moving expenses never incurred. The furniture contained in the 64 rooms of the Windemere Hotel was not moved to the defendant's Kingsbury Court Apartments as he certified to HUD; rather, it was sold to one Richard Green for approximately $1,000. Green took possession of the furniture at the hotel and transported it himself at no cost to the defendant.

The Government's key witness was Rober Fowler, a business relocation specialist for LCRA at the time of the offense in 1969, who arranged the fraudulent transaction for personal gain. Fowler did not implicate the defendant when he was first interviewed under oath in May, 1974, but later he testified that he arranged the fraudulent payment with Librach's knowledge and connivance, receiving in return a kickback of $1,000. Fowler's implication of Librach was partly corroborated by Charles Ginsberg, a real estate broker who telephoned Librach in 1969 to submit Green's offer to buy the furniture. Librach accepted the offer, according to Ginsberg. Fowler was further corroborated by Sam Siegel, another real estate broker, who accompanied Librach to Fowler's office to discuss the deal in 1969.

Fowler was in protective custody when he testified at trial and was informally granted immunity, apparently since hs is chronically ill from sickle cell anemia. Six months prior to trial he reported threats on his life and was relocated with his wife and seven children and was paid $1,000 per month plus expenses. By the time of trial Fowler had received $9,947.65 in "subsistence maintenance and relocation payments" from the Government. Defense counsel first learned of the protective custody during the trial and was not informed of Fowler's support payments until several weeks after trial.

The defendant testified that he filed the LCRA

claim as an agent accomodating his ailing stepmother who had left St.Louis to live with her daughter in Kansas City. Mrs. Librach, he claims, nevertheless dealt directly with Siegel and Heller, the realty firm managing the sale or relocation of the hotel. The defendant admitted going to Fowler's LCRA office at Siegel's request to sign papers concerning the move, but insists he signed only as Fowler instructed. He claims he did not know, and did not check to see, if the furniture had been moved but claims Siegel and Fowler told him it was. He disclaimed financial interest in the furniture and, though he personally received the $12,200[1] LCRA payment in September, 1969, he remitted the entire amount to his stepmother in June, 1970. He admitted appropriating some of the funds for his own use during this interim period.

I. The defendant contends that Government suppression of favorable evidence denied him due process. In response to his discovery motion requesting all favorable evidence, filed five months before trial, the Government stated it had no favorable evidence, but promised to disclose any that might arise later. He designates three items of evidence relevant to impeach the Government's key witness, Robert Fowler, which were suppressed. They are (1) the contradiction between Fowler's sworn pretrial statement that did not inculpate the defendant (disclosed three weeks before trial) and Fowler's later grand jury testimony that did (disclosed just prior to trial), (2) the fact that Fowler was placed in protective government custody beginning in June,1974 (not disclosed until trial),

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[1]The $12,200 figure includes $2,500 lawfully claimed as a relocation benefit and $9,700 fraudulently claimed for moving expenses.

and (3) the undisclosed fact that Fowler was paid nearly $10,000 during the six months from June, 1974 until after trial in January, 1975.

Defendant relies on the familiar rule that government suppression of favorable evidence material to the defense justifies a new trial irrespective of the good or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83 (1963). In Giglio v. United States, 405 U.S. 150 (1972), the Supreme Court reversed a conviction secured on a witness's false denial that the Government promised him leniency for his testimony. Therein it noted that the particular witness's reliability may have been determinative of guilt or innocence. The Court held that nondisclosure of evidence affecting the witness's credibility falls within the Brady rule, provided "the false [or suppressed] testimony could. . . in any reasonable likelihood have affected the judgment of the jury . . . ." Giglio v. United States, supra at 154, quoting Napue v. Illinois, 360 U.S. 264, 271 (1959).

Application of these principles to the instant case calls for a new trial. This is an egregious case of prosecutorial suppression of evidence that was both favorable and material to the defense. Evans v. Jannings, 489 F.2d 470, 475 (8th Cir. 1973). The Government's failure to disclose protective custody and its substantial payment of almost $10,000 to Robert Fowler obviously could have affected the jury's judgment of the witness's credibility. The circumstances were such that Fowler's testimony was the primary basis for determining Librach's guilt. The Government's paying a monthly subsidy to a witness is certainly a fact that should be disclosed to the trier of the facts since it is relevant to the witness's interest in testifying. Here, actually, Fowler's culpability is greater than that of the defendant. Fowler

violated his public trust by fraudulently dispensing public funds. Yet the Government grants him immunity and a compensation of $1,000 a month plus expenses. Many observers may feel this is a strange way to enforce the criminal laws. Therefore, despite substantial evidence that Librach committed the crime charged, his due process rights to a fair trial have been violated and he is entitled to a new trial.

Fowler was the final witness on the first day of the two day trial. Defendant claims he did not discover that Fowler was in protective custody until the witness left the courtroom accompanied by two persons whom he recognized as Deputy United States Marshals. On inquiry, the prosecutor informed the defendant that Fowler was in protective custody but did not mention the payments or describe the custody in any detail. Defendant did not recall Fowler for additional cross-examination concerning his protective custody. However, it was not until several weeks after trial that he learned Fowler was receiving substantial Government support. And even then counsel learned of the financial support only inadvertently.[2]

We have no doubt that evidence of payments of nearly $10,000 to a witness in circumstances providing him an incentive to change his testimony is favorable and material[3] to the defense and that its suppression

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[2]Fowler had testified that he was currently unemployed.

[3]The higher standard of materiality required in a post-conviction case of evidence admissible only for impeachment, Evans v. Janning, supra at 477, citing Link v. United States, 352 F.2d 207, 212 (8th Cir. 1965), cert. denied, 383 U.S. 915 (1966), has no application in this direct appeal.

requires a new trial. This court cannot place its approval on the undisclosed payment of money to a government witness in these circumstances.[4] The Government's insistence that the suppression was inadvertent and that Fowler's friendly relationship with the prosecution was in fact partially disclosed, does not eliminate the need for reversal if the balance of the evidence suppressed "might reasonably have affected the jury's judgment on some

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[4]The Government's argument that the custody and support were not suppressed for the reason that the defendant had notice of them is not well taken. When the Government telephoned the defendant's attorney on June 20, 1974, to advise him that a witness's life had been threatened and that a witness was being placed under government protection, it did not identify Fowler by name.

Its additional argument that evidence of protective custody and support payments was unfavorable to the defendant, or that he waived error by choosing not to recall and cross-examine Fowler after learning of the protective custody for fear that the Government would disclose the threats allegedly made on Fowler's life is untenable as well. First, the Government concedes it had no factual basis with which to link the alleged threats to the defendant to admit Fowler's report of the threats into evidence. Second, although the matter of protective custody because of reported threats to a witness can have unfortunate connotations against the defendant, whether or not the defendant desires the matter explained before a jury is a question that must be left up to him to decide. That the impact may be unfavorable to the defendant is no excuse for nondisclosure of the pertinent facts of protective custody to the defendant.

material point." United States v. Butler, 16 Cr. L. Rep. 2345, 2346 (9th Cir. Dec. 18, 1974); accord, United States v. Smith, 480 F.2d 664 (5th Cir. 1973).

Applying this test to the instant facts it is significant that Fowler's credibility was crucial to the case against Librach and that suppression of the evidence might reasonably have affected the jury's judgment of his credibility. It was Fowler who directly testified that the defendant knew the furniture had not been moved when he filed the claim.

However, the Government's withholding of Fowler's contradictory grand jury testimony does not provide an additional basis for relief. Fowler's May 8, 1974 statement, produced three weeks before trial, was relatively innocuous considered alone. The same witness's inconsistent grand jury testimony incriminating the defendant was produced three days before trial and repeated during trial. It was not suppressed. Favorable pretrial statements or grand jury testimony by prospective government witnesses need not be disclosed until after the witness testifies at trial. United States v. Eisenberg, 469 F.2d 156, 160 (8th Cir. 1972), cert. denied, 410 U.S. 992 (1973). The defendant's complaint that the withholding lulled him into a false sense of security concerning Fowler's testimony is unconvincing. Librach's counsel effectively cross-examined Fowler using the witnesses's prior inconsistent statements despite the short notice caused by the withholding. The defendant, moreoever, did not request a continuance to allow additional time for trial preparation.

II. Defendant argues that he was denied due process by the delay of four years eleven months between the time of the offense and the filing of the indictment. He acknowledges that this

court has not yet reversed a conviction for pre-trial indictment delay but argues that the factors stated in Barker v. Wingo, 407 U.S. 514 (1972), apply here and justify dismissal. Resolution of this claim, however, arising under the Fifth Amendment Due Process Clause rather than the Six Amendment, requires a balancing of the reasonableness of the delay against the prejudice to the accused, if any. United States v. Jackson, 504 F.2d 337, 339 (8th Cir. 1974), cert. denied, 43 U.S.L.W. 3474 (U.S. Mar. 3, 1975) (No. 74-5673).

The offense occurred August 14, 1969. The indictment was filed July 10, 1974. Defendant argues that the investigation was underway as early as February, 1972, when he was interviewed by the FBI. However, he argues he was not then informed he was a target of the investigation and thus had no notice. Consequently, he argues, he was unable to reconstruct past events to prepare his defense and lost the testimony of three witnesses: his stepmother, Peppi Librach, owner of the hotel, who is critically ill and suffers from impaired mental function and loss of memory; the accountant for the hotel, Max Rosenbaum, who died shortly before trial; and defendant's sister, June Rosen, who assisted in managing the hotel and who died in November, 1973.

The Government contends there has been no unreasonable delay. The United States Attorney became active in the case in May, 1974, when Siegel and Fowler appeared before the grand jury. The indictment was filed promptly thereafter. The defendant, it argues, had sufficient notice that the investigation was underway from his two 1972 FBI interviews and could have marshalled his defense then. Further, he did not demonstrate what evidence he might have obtained from the three lost witnesses.

The pre-indictment delay was not unreasonable in this case. The lapse in time between the offense and the indictment was understandable. Cases of fraud are difficult to develop. Corroborative evidence is difficult to secure and, of course, the participants in the fraud normally suppress evidence and impede the investigation. Moreover, the case against Librach reduces primarily to a test of credibility between Fowler and the defendant as to Librach's knowledge whether the furniture had been moved when he claimed reimbursement. Defendant failed to show how the three witnesses would aid him on that issue and otherwise failed to demonstrate adequate prejudice. In fact, there is evidence that Librach started to construct his defense shortly after the first FBI interview. This would be the usual and ordinary reaction of any person, guilty or not, who was involved in a web of government payments on fraudulent claims.

III. Defendant argues that the Government knew that Fowler perjured himself during the trial, since his testimony was inconsistent with his prior sworn statement, and that the court erred in refusing to strike the testimony. The jury, however, was fully informed of Fowler's inconsistent statements and he was corroborated in part by other witnesses. Assessing the credibility of witnesses is a matter solely for the jury even though there is strong impeaching evidence in this case. United States v. Miles, 472 F.2d 1145 (8th Cir.), cert.denied, 412 U.S. 907 (1973). The defendant's contention that Fowler's testimony was so lacking in credibility as not to warrant belief does not appear well taken. Fowler's testimony, despite his prior inconsistent statements, in may facets could be viewed as more credible than that of defendant. Defendant's version of knowing nothing about the undisputed fraud beggars belief. At the minimum he had a duty to investigate the correctness of his representations to the

Government that 64 rooms of furniture had actually been moved into about 11 vacant units of his two 18-unit apartment buildings. The court did not err in refusing to strike the testimony.

IV. Defendant claims the court erred in permitting the Government to lead and cross-examine its witness, Siegel, on direct examination under the guise of refreshing his recollection with his prior inconsistent grand jury testimony. Siegel testified to the grand jury that two years after the offense he heard a conversation in which the defendant identified the person who bought the hotel's furniture. The Government called Siegel at trial to prove Librach's guilty knowledge that the furniture was sole, not moved, despite the defendant's certification to the contrary. To the government's surprise, however, Siegel testified somewhat confusingly that Librach said no such thing and that he had learned from someone other than the defendant the identity of the person who purchased the furniture.

Finding the witness to be evasive, the court permitted the Government to lead Siegel by reading aloud his grand jury testimony that he heard the defendant discuss sale of the furniture. As confusion continued, however, the court questioned Siegel directly and the witness responded that he had not heard the defendant make any such declaration. The court consequently struck the testimony, including Siegel's grand jury answers, and ordered the jury to disregard what Siegel said concerning the meeting between the defendant and others.

In the circumstances, we find no abuse of discretion in permitting the Government to lead its evasive witness to develop his testimony. Lerma v. United States, 387 F.2d 178, 190 (8th Cir. 1968); Rule 611 (c), Fed. R. Ev. Nor did the court err

in denying a mistrial. The court instructed the jury to disregard the objectionable portion of Siegel's testimony and no prejudice resulted from it. Siegel primarily told the jury that he had not heard Librach discuss the sale of the furniture.

V. Defendant's final contention is that he should have been charged and sentenced under 18 U.S.C. § 1012 (1970), a misdemeanor statute expressly proscribing frauds against HUD, rather than under the general felony fraud statute, 18 U.S.C. §1001. Section 1012, however, was not intended to serve as the exclusive criminal remedy for frauds against HUD so as to prevent use of the harsher general statute, §1001, where applicable. United States v. Brown, 482 F.2d 1359 (9th Cir. 1973). When, as in this case, criminal conduct violates more than one statute, the Government is free to proceed under the harsher provision if it elects to do so. United States v. Brown, supra; United States v. Eisenmann, 396 F.2d 565, 568 (2d Cir. 1968).

The judgment of conviction is reversed and the case remanded for a new trial.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT